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In the Supreme Court of the United States

OCTOBER TERM, 1977

LOUIS A. MARKERT and ROBERT CRAIG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioners, Louis A. Markert and Robert Craig pray that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the Seventh Circuit entered in this cause.

OPINIONS OF THE COURTS BELOW

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, denying a Motion to Dismiss in *United States* v. *Craig, et al.*, No. 74 CR 877, is not officially reported but is printed in the Appendix to this Petition (App. 1-10). That Court's Order Suppressing was entered on March 17, 1975, and is printed in the Appendix to this Petition (App. 10) as is the Second Memorandum and Order of the United States District Court for the Northern District of Illinois, Eastern Division, entered May 23, 1975 (App. 11-20). The first Opinion of the United States Court of Appeals for the Seventh Circuit under the same title and numbered 75-1592 of that Court was entered on January 5, 1976, and, is officially reported at 528 F.2d 733 and is also printed in the Appendix hereto (App. 21-43). A second Opinion of the United States Court of Appeals for the Seventh Circuit decided July 9, 1976, after hearing *en banc* is reported at 537 F.2d 957 and is also included as an Appendix to this Petition (App. 44-46).

A Petition for Certiorari to this Court to review of the January 5, 1976, decision was denied, 425 U.S. 973, the Solicitor General in that proceeding urging non-finality upon this Court since a Petition of the Government for Rehearing En Banc was pending before the Seventh Circuit at the time the Petition for Certiorari was made by the Petitioner therein, Louis A. Markert. (No. 75-1225 of this Court). A Petition for Certiorari to review the July 9, 1976 decision was denied by this Court on December 6, 1976 (97 S.Ct. 526), the Solicitor General at that time urging upon the Court that certiorari should be denied since there was an absence of conflicts in Circuits. (No. 76-179 of this Court).

Thereafter, trial was had upon the merits, and findings of guilty returned as to these Petitioners. Appeal was again taken to the United States Court of Appeals for the Seventh Circuit, and those convictions were affirmed on March 22, 1978. That decision is not yet reported but it is included in the Appendix to this Petition (App. 47-58).

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was filed on March 22, 1978. (App. 47) This Petition is filed within thirty days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Do the principles of common law in light of reason and experience dictate the recognition of a federal common law legislative privilege to be applied in federal criminal prosecutions against elected State legislators?

2. Do the Federal Rules of Evidence command that a privilege, once having been recognized, be generally applied both criminally as well as civilly?

3. Does the decision of the Court below in respect of venue indicate that the constitutional command and this Court's interpretation thereof are obsolete?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 12, Illinois State Constitution of 1970; Smith-Hurd Illinois Annotated Statutes.

> ". . . A member (of the General Assembly) shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. These immunities shall apply to committee and legislative commission proceedings."

Amendments VI and X—Constitution of the United States

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT X—RESERVED POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Title 18, United States Code, Section 1951

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future,

to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

Title 18, United States Code, Section 1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing what-

ever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j) (11), 84 Stat. 778.

Rule 501, Federal Rules of Evidence

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933.

Rule 1101(b) & (c), Federal Rules of Evidence

Rule 1101. Applicability of Rules

• • •

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

STATEMENT OF THE CASE

This case originated by the filing of an indictment in two counts against these Petitioners, for activities while both members of the Illinois General Assembly and against another, Thomas Hanahan (plus an unindicted co-conspirator, also a legislator) under the provisions of Title 18, U.S.C. §1951 and Section 1341.

The indictment charges in part are quoted hereafter, with our emphasis, to demonstrate that they squarely concerned legislative acts:[1]

> "1. At all times material herein, *the people of the State of Illinois entrusted and vested the legislative power in the General Assembly of the State of Illinois* consisting of the duly elected members of the Senate and the House of Representatives.
>
> "2. From January 6, 1971 to and including January 9, 1973, the following individuals were *public officers and duly elected members of the House of Representatives* of the Seventy-Seventh General Assembly of the State of Illinois:
>
> ROBERT CRAIG,
> THOMAS J. HANAHAN,
> LOUIS A. MARKERT, and
> PETE PAPPAS,
>
> and were *entrusted and vested by reason of their office with the legislative power of the State of Illinois.*
>
> • • •

[1] This is done for demonstration that the legislative activity was the central core of the charges, and the proof. Cf. *United States* v. *Di Carlo*, 1 Cir., 565 F.2d 802, which case, near the inception, rejects any concept that it was "tried on the theory that he [Di Carlo] took certain legislative actions." 565 F.2d at p. 805.

". . . in that the defendant and Pete Pappas *did wrongfully conspire to use the power and authority vested in them by reason of their office as members of the House of Representatives to unlawfully obtain and cause to be obtained property,* . . . .

• • •

Count Two stated in part:

• • •

"3. • • •

"a. The citizens of the State of Illinois of their loyal, faithful and honest services in *their official positions as members of the House of Representatives and as representatives of the people of the State of Illinois.*

"b. The State of Illinois and its citizens of their right to have *the legislative business of the State of Illinois conducted* honestly, impartially and free from extortion, corruption, fraud, conflict of interest and in accordance with the laws of the State of Illinois.

"The scheme and artifice to defraud is more fully set forth as follows:

"4. It was a part of the scheme and artifice to defraud that *THOMAS J. HANAHAN would and did use his position as a public officer and member of the House of Representatives of the Seventy-Seventh General Assembly to introduce and be chief sponsor of House Bill 2025.*

"5. It was further a part of the scheme and artifice to defraud that *ROBERT CRAIG, THOMAS J. HANAHAN and Pete Pappas would and did cause consideration of House Bill 2025 in the Motor Vehicles Division of the House Transportation Committee to be postponed.*

• • •

"8. It was further a part of the scheme and artifice to defraud that the *defendants would and did cause and allow House Bill 2025 in the Seventy-Seventh General Assembly to remain in the Motor Vehicles Division of the House Transportation Committee, and not*

be presented to the House of Representatives for second reading, until said House Bill 2025 was tabled pursuant to the House Rules of the Seventy-Seventh General Assembly.

• • •"

The Petitioners moved (ultimately unsuccessfully) to dismiss the indictment as violative of the Speech or Debate Clauses of the United States Constitution and of the State of Illinois. Motion was also made to suppress evidence derived from the privileges embodied in those Constitutions. The Motion to Suppress was allowed and a suppression order entered. On appeal by the United States, the United States Court of Appeals for the Seventh Circuit found a common law privilege co-extensive with Speech or Debate, and to that extent affirmed the lower court. As to statements of the present petitioner Markert, the Court found waiver by failing to affirmatively invoke the privilege. A dissent filed in that case found no privilege for state legislators, except as directed by general official immunity, and finding no privilege, found no occasion for waiver. (528 F.2d 773) On the grant of a Rehearing *En Banc,* the panel minority became the majority opinion, three (3) judges filing separate dissents. (537 F.2d 957) [2]

Statement of the Evidence On Venue

The evidence on the trial which ultimately followed is concisely set forth at App. 48-50 of the Appendix hereto, which, however, omits the locations of most of the occur-

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[2] The initial question of waiver is no longer a part of this petition. The present law of the Seventh Circuit being there is no privilege and thus, it follows, that the question of waiver is not appropriate, (528 F.2d at page 784); the case finding a privilege, *In Re Grand Jury Proceedings,* 3 Cir., 563 F.2d 577, determined a bar against the use of evidence in judicial proceedings (563 F.2d at p. 584). rather than a right to be affirmatively invoked.

rences. Because there is a Sixth Amendment vicinage question raised by this case, review of evidence relative to the vicinage provisions seems appropriate:

The evidence showed that defendant Thomas J. Hanahan (acquitted on trial) introduced a Bill entitled House Bill 2025 before the Illinois General Assembly at Springfield, Illinois, in the Southern District. The Bill would have amended the Illinois Vehicle Code to require showing that it was a rental car and thus diminish its resale value.

Shortly after introducing the Bill, Hanahan and petitioner Craig met in Springfield (Southern District) with Pete Pappas (the unindicted legislator, and one of the two chief government witnesses), who was Chairman of the Motor Vehicle Committee of the House of Representatives of the State of Illinois, (these two petitioners were members of the Committee) and to which Committee House Bill 2025 was to be assigned. It was agreed that the money generated by the Bill would be evenly divided and that Pappas would not hold any Committee hearings on the Bill until Hanahan had time to negotiate with the CATRALA people, an acronym for Car and Truck Rental and Leasing Association.

On the last day of the Spring, 1971, session Doris Steigberg, the Executive Secretary and Registered Lobbyist of CATRALA, asked Craig in Springfield (Southern District) about the status of House Bill 2025. He responded that he thought the Bill could be stopped for $5,000.00. After Steigberg indicated that her people were having a difficult enough time paying her salary, and that she didn't know how she could raise that amount of money, Craig instructed her to "take it back to [her] people and see

what they could do." Steigberg immediately phoned Frank Lonano, the President of CATRALA at his Schiller Park, (Northern District) Illinois, office, and told him that she had been approached for money on House Bill 2025.

A few days prior to October 22, 1971, Steigberg told Petitioner Craig at Springfield that her people indicated that the $5,000.00 was too much and Craig urged her to "try for $2,000". Again Steigberg spoke with Lonano. On October 22, a date that House Bill 2025 was scheduled for hearing, Petitioner Markert asked Steigberg at Springfield, if she had heard anything. Steigberg told Petitioner Markert that $2,000.00 was too much money, and asked if he could "try for $1,500.00". Again shortly after, and again in Springfield, Petitioner Markert told Steigberg that although they were unhappy about it, $1,500.00 would be acceptable. Steigberg told Lonano, but he forestalled, saying basically to do something other than what she wanted, leaving no conclusion to this conversation. (Tr. 448-449) [3] Lonano never agreed to pay any amounts of money, nor did CATRALA.

On November 12, 1971, Steigberg phoned Lee Workman who was an assistant Vice President for Hertz Corporation, whose Chicago's own office was in Des Plaines, Illinois (Northern District). Hertz was a member of CATRALA and Workman was a member of the CATRALA Board of Directors. Steigberg told Workman that time was running out regarding House Bill 2025, that it was decided the financial burden of $5,000.00 would fall on the four largest rental car operators, and that Hertz's share was $1,500.00.

Workman prepared a check drawn on Hertz's petty cash account at a Chicago bank. The check for $1,500 was made

[3] "Tr." refers to transcript of testimony.

payable to Steigberg, sent it by special delivery mail from the Hertz office in Des Plaines (Northern District) to Steigberg in Springfield (Southern District).

Steigberg received the check in Springfield on November 14, 1971. After cashing the check at a hotel in Springfield, Steigberg placed the money in an envelope, and wrote "Robert Craig, personal" on the outside.

Steigberg took the envelope to Craig's office in the State Capitol, but found that Craig had departed for home, [Danville, Illinois, Eastern District]. Craig's secretary, Sherron Ackley, indicated that she would be flying to Craig's home with some other materials and would take the envelope for Craig with her. Steigberg left the envelope with Ackley.

Some time later Pappas from the Southern District, telephoned Craig in the Eastern District and asked if they had received the money from the rental car bill. Craig answered affirmatively, and said he'd mail Pappas his share. Two or three days later, Pappas received $600 in cash in the mail, mailed from the Eastern District to the Southern District.

At the conclusion of the government's evidence, and again at the conclusion of the case, motions for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure were made on the basis that, as to Count I, no agreement had been made within the Northern District of Illinois, nor was any act performed by any alleged co-conspirator within that District. On appeal as to this contention the Court of Appeals stated:

> "Venue for a Hobbs Act prosecution properly lies in any district where commerce is affected. *United*

States v. *Floyd*, 228 F.2d 913, 918 (7th Cir.), *cert. denied*, 351 U.S. 938 (1956). See also: 18 U.S.C. § 3237. In this case the evidence showed that the federal offense of extortion occurred in the Northern District of Illinois because defendants' misdeeds affected commerce in that district. The extorted money was shown to have come from the Hertz Corporation's petty cash fund in Chicago, in the Northern District of Illinois. Hertz Corporation was shown to be a company engaged in interstate commerce within the meaning of 18 U.S.C. § 1951(b)(3). Because the extortion affected commerce in Chicago, the District Court for the Northern District of Illinois was empowered to entertain that charge, regardless of the fact that defendants may have been prosecuted in another district under venue principles pertaining to conspiracy." (App. 52-53)

REASONS FOR GRANTING THE WRIT

1. THE MAJORITY DECISION OF THE COURT BELOW IN ITS EN BANC, AND FINAL DECISION HAS BEEN EXPRESSLY DISAVOWED BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT IN IN RE: GRAND JURY PROCEEDINGS, 563 F.2d 577.[4]

It has also been expressly disavowed by the United States District Court for the Western District of Tennes-

[4] "Federal Rule of Evidence 501 provides that a privilege 'shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience.' This rule applies in criminal as well as civil proceedings. In *Craig (I), supra*, the court traced the history of federal evidentiary law in criminal cases culminating with the enactment of Rule 501 after spirited congressional action. We agree with the reasoning of the panel majority which found that principles of common law in light of reason and experience dictate the recognition of a federal common law legislative privilege to be applied in federal criminal prosecutions. *We are unable to accept the position adopted by the majority of the court in banc in Craig (II), supra.*"
(563 F.2d at p. 583, emphasis supplied)

see [5] in *United States* v. *Gillock*, Criminal CR 76-104.[6]

Thus, there has arisen among the circuits two opposing lines of decision on this important and recurring question

[5] "As we read Judge Tone's concurring opinion in *Craig* (which became the majority view of the *en banc* court), his reason for holding that there is no speech or debate privilege for state legislators in this context is this: that the reason for the speech or debate privilege in the federal Constitution is to maintain the principle of the separation of powers of Congress vis-a-vis the federal executive branch; there being no problem of separation of powers as between the federal executive and the state legislatures, the federal Constitution creates no speech or debate privilege for state legislators and the federal courts should not recognize one pursuant to Rule 501 of the Rules of Evidence.

As we read Judge Cummings' opinion in *Craig* (which became the minority view of the *en banc* court), his reason for holding that there is a privilege under Rule 501 is this: that while separation of powers is one of the reasons for speech or debate protection for members of Congress in the federal Constitution and for members of legislatures in state constitutions, it is not the *only* reason; moreover the very nature of our federal system, with our federal government being one of limited powers, as well as a continuing need to maintain federal-state relations in appropriate equilibrium require that state legislators have the protection of the speech or debate privilege vis-a-vis the federal executive branch and its prosecutors.

Upon consideration, we conclude that Judge Cummings has the better of the debate, particularly in the light of some language in a couple of Supreme Court opinions dealing with the reason for the speech or debate privilege."
United States v. *Gillock*, W.D. Tenn., Criminal CR 76-104.

[6] Appeal was taken to Court of Appeals for the Sixth Circuit. A limited remand followed for the purpose of allowing the District Court to delineate the evidentiary material it had determined to be improper. The Sixth Circuit has again resumed jurisdiction, has had reargument, but has not yet entered its final opinion.

of the very existence of a privilege securing the legislative representatives of the people of the several states in the exercise of their legislative functions and the reasons therefor.

This Court should resolve this important question of federal law, particularly in the light of the disagreement in the courts of the United States, which admittedly are beyond reconciliation otherwise.

2. THE DECISION OF THE COURT BELOW THAT NO PRIVILEGE EXISTS IN PRINCIPLES OF THE COMMON LAW FOR THE PROTECTION OF STATE LEGISLATORS FOR THEIR ACTS AS ELECTED REPRESENTATIVES—SO FAR AS CRIMINAL LIABILITY IS CONCERNED—IS CONTRARY TO, AND IN CONFLICT WITH, APPLICABLE DECISIONS OF THIS COURT.

Under reasoning of the majority of the court below, sitting en banc on rehearing, it was held that there was no privilege derived from the common law that gave State legislators protection in a federal criminal proceeding brought against them or him; that his or their sole protection existed in the broad aspect of official immunity, functional only in civil cases. More precisely, the majority endorsed the conclusion that:

> "The majority, (now minority) further states in the same footnote that the testimonial privilege for state legislators 'rests on the constitutional judgment that the courts are not deemed the proper place to hold legislators accountable for their acts as elected representatives,' citing *Tenney* v. *Brandhove*. I do not believe *Tenney* supports the view that state legislators have a speech or debate immunity derived from the Federal Constitution. See p. 781 above. If they do not, and if I am correct that the doctrine of official immunity leaves criminally liable under federal law for even their legislative acts, I cannot believe they are privileged . . ." (528 F.2d at 784, parenthetical material supplied)

This conclusion it has reached because of a footnoted parenthetical observation in *United States* v. *Brewster*, 408 U.S. 501, which, commenting on this Court's determination in *Tenney* v. *Brandhove*, 341 U.S. 367, pointed out that the *Tenney* case was "not a Speech or Debate case". (408 U.S. at 516, fn. 10) We submit this observation of this Court in *Brewster* was not a ruling that there was not extant a testimonial privilege that was co-extensive with Speech or Debate, but rather that *Tenney* v. *Brandhove* did not apply any such testimonial privilege on the basic ground that no action of Congressmen was in question in that case. We submit that it was *not* the finding of this Court in *Tenney* that the federal common law did not recognize such a testimonial privilege. But from this language, we submit, in erroneous interpretation, the majority opinion deduced that there exists no testimonial privilege commensurate with Speech or Debate, and that such protection as might be availed of would have to be related directly to the doctrine of official immunity applicable to other branches of government, and likewise would not be in excess of that immunity. Holding that State Legislators do not have a Speech or Debate immunity derived from the federal constitution, it concluded that necessarily the doctrine of ordinary official immunity leaves State legislators criminally liable under federal law for even their legislative acts. (528 F.2d at page 784) This conclusion, in turn, was predicated on a finding that common law official immunity has not been extended to criminal liability and that official immunity from such civil liability, but not

from criminal liability, has been regarded by the majority as sufficient to achieve the purpose of the doctrine of official immunity, "which is to promote independence and fearless discharge of duty on the part of the protected officials." (528 F.2d at page 783). Apparently, it found that only individuals seeking money damage served to impede such independence and lack of fear.

On the other hand, the main minority opinion made a determination that the testimonial privilege of these petitioners was not based on a doctrine of official immunity. 528 F.2d at page 779. Instead, following the historical development of Speech or Debate Immunity, the main minority opinion found Speech or Debate firmly entrenched in American common law as early as the colonial period. In reaching this conclusion it borrowed heavily upon this Court's decisions in both *Tenney* v. *Brandhove* (supra) and *Kilbourn* v. *Thompson,* 103 U.S. 168. Noting its origin in the 17th century struggle between the British Parliament and the Crown over the imprisonment of members of Parliament for speeches made in Parliament (*Tenney* v. *Brandhove,* 341 U.S. 367, 372; *Kilbourn* v. *Thompson,* 103 U.S. 168, 202), and its codification into the English Bill of Rights in that century, the minority noted that Speech or Debate immunity was already established in English common law. (*Tenney* v. *Brandhove,* supra at page 372) The minority considered it followed that Speech or Debate immunity was thus a part of the common law received in colonial America, and was included in two state constitutions by general provisions preserving English law. (*Tenney* v. *Brandhove,* supra, at 374, fn. 3) It reasoned that the inclusion of a Speech or Debate clause in the Articles of Confederation and the Federal Constitution was merely a reflection of political principles already firmly established in American common law. (*Tenney* v. *Brandhove,* supra, at 367)

While the majority opinion was satisfied that a privilege co-extensive with Speech or Debate was appropriate to the United States Legislators in criminal prosecutions, it isolated the basis therefor to an implementation of the separation of powers. Since, the majority concluded, there was no danger of interference with state legislative prerogative by a federal executive, the purpose for extension to criminal prosecutions in which state legislators were involved was not required. On the other hand the main minority opinion held that the separation of powers between the federal and state governments was as important as the distribution of authority between the three branches of the federal government, 528 F.2d at page 778; that the recognition of a federal common law Speech or Debate privilege was necessary to prevent potential federal interference with a state legislator's official duties. 528 F.2d at 778-779.

Rather than adhering to the common law, we submit that the majority opinion's invocation of the doctrine of simple official immunity has never before been applied to protect state legislators. Indeed this Court in *Tenney* v. *Brandhove,* (supra) strongly implied that the immunity from civil suit accorded to state legislators under federal common law was analogous to that extended by the Speech or Debate Clause (supra at pages 372-376). Likewise, the majority erred in not evaluating the testimonial privilege in terms of a Speech or Debate privilege originating in federal common law, rather than as the court-fashioned official immunity.

We submit, as we think has been done hereinabove, the doctrine of Speech or Debate privilege originating in the 17th Century in England; thence through a common law recognition in colonial America to a codification in the federal

constitution, as well as in the several constitutions of the vast majority of states an application of that privilege to civil procedures, and to the exclusion of criminal proceedings, is an untenable inconsistency. Starting with the leading American case of *Coffin* v. *Coffin*, 4 Mass. 1 at page 27, the Court said:

> "These privileges are thus secured, . . . to support the rights of the people by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal."

In *In re Grand Jury Proceedings*, 563 F.2d 577, (a case in admitted conflict with the Court below), the Third Circuit rationalized that:

> "The state legislators, while they must yield to federal authority in areas where that government is supreme, nevertheless have extremely important functions to perform. Their work could be substantially hindered by exposing members to litigation arising out of the performance of legislative duties. Recognition of this fact led the Supreme Court to grant official immunity for federal civil suits, *Tenney* v. *Brandhove, supra.* That same concern in common law history supports the existence of a privilege for state legislators in federal criminal proceedings. Principles of federal-state comity—'a proper respect for state functions,' *Younger* v. *Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971),—reinforce this conclusion." 563 F.2d 577, 583.

Whether the relief for these petitioners is termed "immunity" or "privilege" is of no concern but semantical. The real concern arises where the majority opinion, by necessary inference, commits the application to one arm of government by the same measure as another. This is contrary to this Court's decisions.

We submit, the protections accorded the several branches under common law are not to be equated. *Doe* v. *McMillan*, 412 U.S. 306, on which the majority relies, makes it clear that the scope of common-law immunity is not the same for all officers for all purposes. (412 U.S. at p. 319) More recently, this Court availed itself of occasion to address the same question in *Imbler* v. *Pachtman*, 96 S.Ct. 984, where the court noted that distinctions do obtain. First, denominating the position of legislators, the Supreme Court said:

> "Regardless of any unworthy purpose animating their actions, legislators were held to enjoy under this statute [civil rights] their usual immunity when acting 'in a field where legislators traditionally have power to act.' *Id.* at 379, 71 S.Ct. at 789." (96 S.Ct. at 989)

Recognizing a distinction between and among governmental officers, this Court emphasized that consideration of each [such official] was predicated upon a considered inquiry into "the immunity historically accorded the *relevant* official at the common law and the interests behind it." (96 S.Ct. at 990)

This is precisely what the minority opinion does, when it says the purpose of the evidentiary principle is the same as that of the substantive aspect, and the privilege must be enforced in a manner that satisfies the purposes for it.

The paramount consideration persists that the official acts performed must be "without apprehension of personal consequences to himself." (This Court quoting itself from *Bradley* v. *Fisher*, 13 Wall 335, in *Stump* v. *Sparkman*, No. 76-1750, reported at 46 LW 4253). As this Court pointed out, the protection persists, even when done with

malice or corruptly. *Stump* v. *Sparkman* (supra) Fn. 5. No "apprehension of personal consequences" are more poignant than potential loss of liberty.

No less are the acts charged here within the scope of petitioner's jurisdiction than were the acts of Judge Stump. Introduction of proposed legislation; committee hearings and the settings thereof; and, ultimately tabling of the proposed legislation.

If we carry the majority opinion to its logical conclusion, and apply it to this Court's recent determination, then, time limitations permitting, Judge Stump continues liable to the sanctions of Title 18 U.S.C. §241 and 242, and no judicial immunity, no privilege, exists to afford him protection against the federal prosecutor. He continues apprehensive of personal consequences for his act though within his judicial jurisdiction.

Just as we submit the federal speech-or-debate clause articulated English and American common law, so have most of the States, including Illinois. Indeed, one of the minority in the Court below:

> "Chief Judge Fairchild is of the view that the constitutional relationship between the states and the United States requires federal courts to recognize and honor the Speech or Debate Clause of the Illinois Constitution, . . ." (App. 46)

The validity of his conviction on this point is bolstered in light of recent decisions of this Court evidencing a renewed respect for the federal-state division of authority guaranteed by the Tenth Amendment (*National League of Cities* v. *Usery*, 426 U.S. 833, 842-843; and the cases controlled thereby, *New Jersey* v. *Usery*, and *Indiana* v. *Usery*, both 427 U.S. 909). It is consistent with the concept of a dual sovereignty recognized in *National League of Cities* to prohibit an examination in federal court of a state legislator's official acts and the motives underlying them, thus diminishing the opportunity for federal intervention in the state legislative process. It would have the correlative prevention of excessive concentration of power in the federal government and the safeguarding of the integrity of the representation provided to the state citizenry.

3. THE DECISION HEREIN RECOGNIZING AN EVIDENTIARY PRIVILEGE, COMMENSURATE WITH LIABILITY, FINDS THE PRIVILEGE OPERATIVE CIVILLY, BUT INOPERATIVE CRIMINALLY, CONTRARY TO THE FEDERAL RULES OF EVIDENCE MAKING PRIVILEGE OPERATIVE AND APPLICABLE BOTH CIVILLY AND CRIMINALLY.

The majority opinion of the Court below encounters no difficulty in recognizing some kind of privilege in state legislators. It resists the contention that this is founded in the federal constitution, but that resistance is of no consequence if it is in fact inbred into the common law. It does recognize that such privilege does exist as an outcropping of the common law doctrine of official immunity. (528 F.2d at p. 782)

An inconsistency arises where the majority holds that the immunity, or privilege, leaves state legislators criminally liable under federal law for even their legislative act. (528 F.2d at 784)

In justification for this inconsistency, the majority opinion continues self-consciously that judges are not immunized from criminal censure because of their official conduct, and in support thereof it cites the *Braatelien* case and the *Manton* case.[7] In *Braatelien*, it was determined

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[7] *Braatelien* v. *United States*, 8 Cir., 147 F.2d 888 and *United States* v. *Manton*, 2 Cir., 107 F.2d 834.

that the acts complained of did not arise in the course of official duty, and, in *Manton,* it does not appear that the question was ever raised. We submit that neither case affords any support for the conclusion reached by the majority in this regard.

On the contrary, the court having found the viability of what it calls official immunity and what we call legislative privilege, was bound by the Federal Rules of Evidence. The Federal Rules of Evidence command that privilege shall be accorded recognition where founded in the common law and, in the light of reason and experience, recognized by the courts of the United States. The many decisions adverted to herein attest the recognition of the legislative privilege by courts of the United States, and its firm establishment in the common law. The Rules of Evidence continue that such privilege, once having been established, shall be applied in cases before courts of the United States, both civil and criminal. (Rule 1101(b) and (c)). The determination of the Court below that this privilege shall be accorded in civil cases, but withheld in criminal cases, is directly contrary to the rules of application inaugurated by this Court, and approved by the Congress of the United States.

This constitutes a radical departure from the course of proceedings mandated by the evidentiary rules governing procedure in United States Courts.

4. THE DECISION OF THE COURT BELOW RESPECTING VENUE IS CONTRARY TO THE CONCEPTS OF THE CONSTITUTION AND EVERY APPLICABLE DECISION OF THIS COURT.

It is the allegation of Count I of the Indictment that these petitioners, as members of the House of Represen-

tatives, did conspire in and with one another. We are here dealing with the constitutional mandate that federal crimes will be tried in the district in which they were committed. Without going into the practical reasons for the constitutional mandate, we will simply refer to this Court's decision wherein it recognized those practical considerations in interpreting the vicinage aspects of the Sixth Amendment.

> "We start with the provision of Art. III, §2 of the Constitution that criminal trials 'shall be held in the State where the said crimes shall have been committed,' a safeguard reinforced by the command of the Sixth Amendment that the criminal trial shall be before the impartial jury of 'the State and district wherein the crime shall have been committed.' We start also with the assumption that Colorado, the residence of petitioner, might offer conveniences and advantages to him which a trial in the District of Columbia might lack. We are also aware that venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it. United States v. Johnson, 323 U.S. 273, 275, 65 S.Ct. 249, 250, 89 L.Ed. 236. We therefore begin our inquiry from the premise that questions of venue are more than matters of mere procedure. 'They raise deep issues of public policy in the light of which legislation must be construed.' United States v. Johnson, supra, 323 U.S. at page 276, 65 S.Ct. at page 251." *Travis* v. *United States*, 364 U.S. 631, 634.

In this case it is the allegation of Count One of the indictment that the petitioners, as members of the House of Representatives, did conspire in and with one another to unlawfully obtain and cause to be obtained a sum of money from the registered lobbyist, officers, members of

and companies belonging to the Illinois Car and Truck Renting and Leasing Association. The named conspirators were the three defendants, Craig, Markert and Hanahan and the government witness Pappas and "other persons to the grand jury unknown." No such "other persons to the grand jury unknown" was ever revealed by the evidence. While 18 U.S.C. §1951 does not require indictment recitation of overt acts, (*Anderson* v. *United States*, 8 Cir. 262 F.2d 764, 771, 772; *United States* v. *Callanan*, E.D.Mo., 173 F. Supp. 98, 101, aff'd 274 F.2d 601, aff'd 81 S.Ct. 321; *United States* v. *Mazzei*, 3 Cir., 521 F.2d 639, 645), no act was taken by any of the named, alleged co-conspirators to agree to nor to effect the object of that conspiracy in the Northern District of Illinois. In the ordinary conspiracy, prosecution may be had either at the place where the conspiracy was formed, (*Dealy* v. *United States*, 152 U.S. 539) or where any of the overt acts were committed by the conspirators, (*Hyde* v. *United States*, 225 U.S. 347; *Ladner* v. *United States*, 5 Cir., 168 F.2d 771, 773). As the Court will note there was a separate scheme, wherein a Mrs. Steigberg, by a fraud unknown to the defendants, secured money from a Chicago-based arm of a multi-national firm. The money was secured by her lies, and the reliance of the Chicago firm on her lies, without any knowledge or even suspicion of the petitioners. It is the determination of the Court below that—notwithstanding the defendants knew nothing about her separate and independent fraud—the defendants knew she had to get the monies from someplace to attain the end of their conspiracy, and therefore they are liable for any of her deviations. That further are they not only liable for any of her deviations, but venue for their agreement lies where the funds of this multi-national corporation were diminished, even though

it came from a source not necessarily related to purchases or interstate transportation. Thus it stated that when *her* victim of *her* fraud gave up money to her that placed the venue for the totally unrelated conspiracy alleged in the indictment, because, under substantive charges under Section 1951, venue is where commerce is affected.

We submit that this is a new area of conspiracy law involving venue, and contrary to every known decision of this court.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court will issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Attorneys for Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOUIS A. MARKEET AND ROBERT CRAIG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1504

LOUIS A. MARKERT and ROBERT CRAIG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioners' convictions (Pet. App. 47-58) is not yet reported. The prior opinion of the court of appeals on the legislative privilege issue is reported at 528 F.2d 773, and the opinion on rehearing *en banc* is reported at 537 F.2d 957, certiorari denied *sub nom. Markert* v. *United States*, 429 U.S. 999.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1978. The petition for a writ of certiorari was filed on April 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a state legislator has a privilege in a federal criminal prosecution that precludes the introduction of evidence showing his legislative acts.
2. Whether venue was properly laid in the Northern District of Illinois.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners Craig and Markert, members of the Illinois General Assembly, were convicted of conspiracy to commit extortion under color of official right, in violation of 18 U.S.C. 371 and 1951, and of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Craig was sentenced to three years' imprisonment, and petitioner Markert was sentenced to six months' imprisonment. The court of appeals affirmed (Pet. App. 47-58).[1]

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[1] "Pet. App." refers to the joint appendix filed by the petitioners herein and by the petitioners in *North* v. *United States*, No. 77-1499; *Walker* v. *United States*, No. 77-1500; *Pappas* v. *United States*, No. 77-1501; and *Craig* v. *United States*, No. 77-1502.

The evidence at trial is not in dispute and is set out in the opinion of the court of appeals. It showed that co-defendant Thomas Hanahan[2] introduced a bill (House Bill 2025) in the Illinois state legislature in April 1971 intended to amend the Illinois Vehicle Code to require that the title certificates of rental cars disclose that such cars had previously been rented (Pet. App. 48). The effect of passage of the bill would have been to reduce the average resale price of a rental car by $500-600 (*ibid.*). Petitioners used House Bill 2025 to extort $1,500 from a rental vehicle trade association, the Illinois Car and Truck Renting and Leasing Association (CATRALA).

Shortly after House Bill 2025 was introduced, Hanahan and petitioner Craig, who was also a state representative, approached fellow representative Pete Pappas, chairman of the committee having jurisdiction over the bill. Pappas agreed to delay hearings on the bill until Hanahan had time to negotiate with the CATRALA representatives, and the three further agreed to split the proceeds from the bill (*ibid.*; Tr. 695-696).

Doris Steigberg, the lobbyist for CATRALA, followed the progress of the bill. After hearings on the bill had been postponed several times (Tr. 701-702), she spoke with Craig on June 30, 1971, the last day of the spring session of the legislature. In response to her question about the status of the bill, Craig said that it could be stopped for $5,000 (Pet. App.

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[2] Hanahan was acquitted at trial.

48; Tr. 190-191). Steigberg protested that the organization was having difficulty paying her salary; Craig nonetheless suggested that she see what the organization could afford (Pet. App. 48-49). Steigberg immediately telephoned Frank LoNano, the CATRALA president, and told him of the demand for money. She later explained the potential effect of the bill to the CATRALA board and told the board members that she had been approached for money on the bill (Pet. App. 49; Tr. 191-194).

A hearing was scheduled on House Bill 2025 shortly after the legislature reconvened in October 1971. A day or so before the committee hearing, Steigberg told Craig that $5,000 was too much. When she asked for the lowest amount that would be acceptable, Craig told her to try for $2,000 (Pet. App. 49; Tr. 199-200). Steigberg then spoke with LoNano, and on the day of the committee hearing she told petitioner Markert, who engaged in the negotiation along with petitioner Craig, that $2,000 was still too high; she asked him if he could try to lower the amount to $1,500 (Pet. App. 49; Tr. 201-202). Markert later told Steigberg that they would accept $1,500, although they were unhappy about it (*ibid.*). In early November 1971, Markert asked Steigberg if she had heard any more about the money; she assured him that it would be paid (Tr. 205-206).

On November 12, 1971, Steigberg telephoned Lee Workman, the Assistant Vice President and Chicago Zone Manager for Hertz Corporation, whose office was in Des Plaines, Illinois. Steigberg told Workman

that the financial burden of the $5,000 demand would have to be shared among the four largest CATRALA members and that Hertz's share would be $1,500 (Pet. App. 49-50). Workman complied and sent her a check for $1,500, with a cover letter indicating that the check was to be used to block the Illinois title law. Steigberg destroyed her copy of the cover letter and directed Workman to do likewise (Pet. App. 50). Thereafter, Steigberg cashed the check, placed the money in an envelope, and proceeded to Craig's office. Craig was not there, but his secretary said she would be flying to Craig's home to take other materials and she would also deliver the envelope. Some time later Pappas telephoned Craig and asked about the money for the bill. Craig told him that it had been received; he then mailed Pappas his share, some $600. House Bill 2025 was later tabled during the spring session of the legislature (*ibid.*).

ARGUMENT

1. Petitioners contend (Pet. 14-24) that as state legislators they were immune from indictment because they were entitled to the benefit of a federal common-law evidentiary privilege precluding the introduction at trial of evidence of their legislative actions.[3]

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[3] Prior to trial, the district court suppressed evidence relating to petitioners' legislative acts (Pet. App. 10-20). On appeal from this ruling, the majority of the panel held that a legislative privilege existed but that petitioner Markert had waived it; Judge Tone, concurring, opined that no privilege

While there is considered dictum in *In Re Grand Jury Proceedings*, 563 F.2d 577 (C.A. 3), looking the other way, we believe that there is no federal common law privilege banning the proof at trial of legislative activities of state legislators who are indicted for violations of federal law. The same legislative privilege claim was recently raised in *DiCarlo* v. *United States*, No. 77-990, and this Court denied certiorari on March 20, 1978. We rely on the analysis contained in our Brief in Opposition in *DiCarlo*, as well as the analysis contained in our Brief in Opposition to the prior petition for certiorari in the instant case, *Markert* v. *United States*, No. 76-179, certiorari denied, 429 U.S. 999. Copies of our briefs in those cases are being forwarded to counsel for petitioners herein.[4]

2. Petitioners also contend (Pet. 24-27) that venue on the indictment for conspiracy to commit extortion in violation of the Hobbs Act, 18 U.S.C. 1951, did not lie in the Northern District of Illinois.

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should be recognized. *United States* v. *Craig*, 528 F.2d 773 (C.A. 7). On rehearing *en banc*, the court adopted Judge Tone's concurring opinion, 537 F.2d 957, certiorari denied *sub nom. Markert* v. *United States*, 429 U.S. 999.

[4] There is no merit to petitioners' claim (Pet. 23-24) that the recognition of common law "official immunity" in civil cases only is contrary to Rule 501, Fed. R. Evid. Rule 501 itself recognizes that privileges may be broader in civil cases than in criminal, and it leaves the determination of a privilege, where it relates to a claim of substance rather than procedure, to state law. Moreover, the reasons for the doctrine of "official immunity" do not call for immunity from criminal prosecution, as we point out in our Brief in Opposition in *DiCarlo*.

The court below properly held that although the conspiracy agreement was formed outside the Northern District of Illinois and no conspirator directly and personally performed an overt act in furtherance of the conspiracy in that district, venue nonetheless was properly laid there (Pet. App. 52-53). Acts of third parties (here, the victims of the extortion), if caused by the conspirators and in furtherance of their scheme, constitute overt acts in furtherance of the conspiracy. *United States* v. *Johnson*, 165 F.2d 42 (C.A. 3), certiorari denied, 332 U.S. 852. In this case, it is undisputed that the $1500 check from Hertz was drawn on a Hertz bank account in Chicago (Pet. 11-12; Pet. App. 50). Thus, the funds subject to extortion were taken from the Northern District of Illinois, and it was the wrongful conduct of petitioners that caused the victims of the extortionate scheme to render payment in that District. Under 18 U.S.C. 3237 (a), the offense was "continued" or "completed" in the Northern District of Illinois, even though it may have "begun" elsewhere. See also *United States* v. *Candella*, 487 F.2d 1223, 1228 (C.A. 2), certiorari denied, 415 U.S. 977, pointing out that venue is properly laid in " 'the whole area through which force propelled by an offender operates,' " and that venue is appropriate in any district "where the decision was reached to make the funds available" as a result of the illegal scheme.

In addition, as the court of appeals pointed out, venue was properly laid in the Northern District of Illinois because commerce was affected in that district.

The payment of $1500 from the bank account in the Northern District of Illinois was sufficient to establish that commerce had been affected there.[5] See *United States* v. *DeMet*, 486 F.2d 816, 821-822 (C.A. 7), certiorari denied, 416 U.S. 969; *United States* v. *Addonizio*, 451 F.2d 49, 60 (C.A. 3), certiorari denied, 405 U.S. 936; *United States* v. *Tropiano*, 418 F.2d 1069, 1076 (C.A. 2), certiorari denied, 397 U.S. 1021. Because venue is proper in any district where commerce directly is affected, *United States* v. *Floyd*, 228 F.2d 913, 918 (C.A. 7), certiorari denied, 351 U.S. 938, and an effect on commerce in the Northern District was shown, venue clearly lay in that district.[6] Petitioners have cited no authority inconsistent with the well-settled principles relied upon by the court below, and their venue contentions merit no further review.

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[5] As the court below properly pointed out (Pet. App. 53), extortion becomes a federal offense in violation of the Hobbs Act where it interferes with interstate commerce "in any way or degree." 18 U.S.C. 1951(a); *Stirone* v. *United States*, 361 U.S. 212, 215.

[6] Because, moreover, the Hobbs Act count was joined with a mail-fraud count based on the same conduct, and concurrent sentences were imposed, any purported error was harmless. Venue under the mail fraud statute, 18 U.S.C. 1341, is proper wherever a mailing originates or is received. *United States* v. *McGregor*, 503 F.2d 1167, 1170 (C.A. 8), certiorari denied, 420 U.S. 926; *United States* v. *Sorce*, 308 F.2d 299, 300 (C.A. 4), certiorari denied, 377 U.S. 957; see also *United States* v. *Joyce*, 499 F.2d 9, 16 (C.A. 7), certiorari denied, 419 U.S. 1031. Since the Hertz check was deposited in the mail in the Northern District of Illinois, venue on the mail fraud charge was properly established there, and the sentences here involved are sustainable on that ground alone.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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